D.B. CENTRAL EXCISE APPEAL NO.26/2005
(U.O.I. Vs. M/S J.K. INDUSTRIES LTD.)

Date of order : 9.11.2006

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. Vinit Kumar Mathur, for the appellant.
Mr. Rajendra Mehta, for the respondent.

Heard learned counsel for the parties.

This appeal is directed against the order of the Customs, Excise & Service Tax Appellate Tribunal, New Delhi dated 7.5.2004. The following questions of law have been framed for consideration at the time of admission :

> "1. Whether the Tribunal was justified in facts and circumstances of the case to conclude that gun-metal scrap was not metal scrap out of capital goods on which modvat credit was paid ?
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> 2. Whether in case no modvat credit is availed, the respondents were still liable to pay excise duty on sale of gun metal scrap under Sub-heading 8002.20 of the Central Excise Tariff Act, 1985 as held by the Commissioner ?"

The facts leading to this case are that during the period from 1.4.1997 to 30.09.2001, the assessee has sold certain gun-metal scrap along with

other waste on which no duty was paid. A show cause notice was issued on 2.5.2002 raising a demand of Rs.21,98,714/- in respect of clearance of such waste and scrap of capital goods. However, at the final adjudication vide order dated 21.11.2002, the demand amounting to Rs.6,36,624/- was only confirmed in respect of copper scrap, electrical cable scrap, gun metal scrap and rubber/belting scrap. Rest of the demand was dropped.

On appeal, the order of the Commissioner was set aside as it was found to be non-speaking order by the Tribunal vide its order dated 04.06.2003 and remanded the case back to the Adjudicating Authority. The Tribunal has quashed the demand altogether in respect of copper and electrical cable scrap and the matter was sent for enquiry in respect of gun metal scrap and rubber/belting scrap.

The assessee contended that gun metal is a tin alloy with addition of zinc and used chiefly for casting requiring considerable strength coupled with corrosion resistance; that these are used as well as supported backing of certain lined bearings in the machinery/ equipment in their factory. This item is put to use as an essential component of the machinery/ equipment, since it protects from corrosion and it has high tolerance limit for temperature ranging upto 205 C when gun metal is used repeatedly, due to wear and

tear, it weakens in terms of its essential characteristics like tensile strength, temperature tolerance, pressure withstandability, etc. it becomes scrap and that scrap is cleared by them without payment of duty as its essential characteristic is lost and no more can be called as gun metal. About the conveyor belting/rubber, the same stand was taken that due to repeated use, it becomes useless. In view of the aforesaid, it was contended that waste and scrap has not arisen out of manufacturing process as scrap of inputs and was not excisable goods at all. For the applicability of Rule 57 AB (2) (b) and 57S (2) (c), it was urged that these capital goods have themselves been removed and sold as capital goods and not otherwise. About the conveyor belt, it was very old having installed in seventies and early eighties, in respect of which no modvat credit was availed because when they were brought into the factory modvat credit was not even available.

The Adjudicating Authority found that the assessee has availed modvat credit on capital goods that is shaft bush, out of which gun metal scrap has arisen and in terms of the provisions of Rule 57S(2) (g) as it prevailed prior to 1.4.2000 was waste of capital goods was required to be cleared on payment of Duty. It also found that under the impugned show cause notice Duty on gun metal scrap has been demanded under Tariff sub-heading No.7403.29 which covers

"other copper alloys other than master alloys of head No.74.05" but considering gun metal to be alloy of tin, it was found to be excisable under sub-heading 8001.20 of the Central Excise Tariff Act, 1985 and a finding was reached that whether the gun metal is a tin alloy or copper alloy, was chargeable to Central Excise duty under specific Tariff sub-heading No.7404.90 and 8002.00. On these findings, the Commissioner confirmed the demand of Rs.2,97,548/- and imposed a penalty of like sum.

On appeal before the Tribunal, the assessee did not dispute excisability of rubber belting scrap. About Levy of Duty on gun metal scrap, the order of the Adjudicating Authority was set aside by finding firstly that there is no evidence to show that the modvat credit was availed in respect of the capital goods out of which the waste in question was the remainder and sold and secondly that unless the machine itself was sold as a scrap or waste on which the modvat credit was availed by the assessee, which was the capital goods on which modvat credit was availed, therefore, the provisions of Rules 57 AB (2) (b) and 57S (2) (c) had no application.

Having perused the Scheme of Rules 57S and 57AB and the Tarrif Items, we find that there has been misconception about the levy of excise duty on scrap of capital goods independent of provisions of Rule

57S/57AB.

The show cause notice was clearly in respect of removing scrap from the site in respect of which modvat credit has been availed. The reason is not far to seek. The assessee does not manufacture capital goods, therefore, the capital goods used in manufacturing the commodity which he produces as and when re-sold does not attract excise duty. Therefore, by necessary corollary the scrap and waste of capital goods removed and sold by the assessee does not attract excise duty by itself. It is only when in respect of capital goods a manufacturer availed modvat credit of Duty paid thereon whatever realization he makes from such capital goods when sold as scrap or waste, he has to surrender the modvat credit availed on such capital goods. It is a simple accounting principle which has been negated in the aforesaid manner.

Therefore, we are of the opinion that waste and scrap of capital goods is not subjected to excise duty independent of provisions of Rules 57S and 57AB and taking any other view would render the provision in this regard under said rules to be otiose and purposeless.

So far as the applicability of Rule 57AB and

57S is concerned, the Tribunal's finding is clearly against the fulfillment of essential conditions for invoking these two provisions. The two provisions during the relevant period could be invoked only in case the waste material sold by the assessee was outcome of the capital goods on which modvat credit has been availed by the assessee. The finding that there is no evidence to support that the capital goods viz. Shaft bush of which the scrap material was sold by the assessee, modvat credit was availed by the manufacturer. This is a finding of fact and that is also not under challenge before us. Keeping in view that the machinery items were installed in the factory much before modvat credit scheme came into existence. Therefore, the first condition about levy of excise duty on the sale of waste and scrap of capital goods in terms of Rule 57AB (2) (b) or 57S (2) (C) did not exist and hence the Tribunal was justified in not sustaining the levy of excise duty on gun metal scrap.

The second reason is also in consonance with the provisions of Rule 57S (2) (C) and 57AB (2) (b). The condition in either case is that capital goods itself has been sold as scrap. There is no dispute that shaft bush the capital goods on which modvat credit was availed has not become scrap and was not sold by the assessee. Apparently, the provisions of Rule 57S (2) (c) and 57AB (2) (b) are attracted only

when the capital goods are sold and removed from the factory as scrap and waste. One of the components of the machine could not be subjected to provisions of Rule 57S and 57AB unless the machine or component part thereof itself has been sold as such. It is not the case of the revenue in respect of gun metal that the component part of the machine itself was sold.

We, therefore, find no force in this appeal and the same is hereby dismissed. No costs.

(GOPAL KRISHAN VYAS), J. (RAJESH BALIA), J.

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